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FIFTH DIVISION
MARCH 4, 2005

No. 1-04-0153

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GOOSE ISLAND, INC., d/b/a
SLICK'S LOUNGE,
Plaintiff-Appellant,

v.

COMMONWEALTH EDISON COMPANY,
an Illinois corporation,
Defendant-Appellee.

) Appeal from the
) Circuit Court of
) Cook County.
)
) No. 03 L 9858
)
) Honorable
) Paddy H. McNamara,
) Judge Presiding.

ORDER

Plaintiff, Goose Island, Inc., doing business as Slick's Lounge, appeals from an order of the circuit court of Cook County dismissing its five-count complaint for monetary damages against defendant, Commonwealth Edison Company. On appeal, plaintiff contends that the trial court erred in determining that it lacked jurisdiction over plaintiff's complaint. We disagree and affirm the judgment of the trial court.

The record reveals the following relevant facts. Plaintiff, Goose Island, Inc, is an Illinois corporation doing business as Slick's Lounge, and operating a bar and restaurant on the property commonly known as 1115 NO-Branch BD, Chicago, Illinois. Defendant, Commonwealth Edison Company (ComEd), is a public utility regulated by the Illinois Commerce Commission (ICC) under

the Illinois Public Utilities Act (The Act). 220 ILCS 5/5-201 (West 2004). ComEd entered into a contract to provide electrical service to Slick's Lounge in December 2000.

On or about August 15, 2001, Goose Island received a utility bill from ComEd that included a charge labeled "transfer debit" in the amount of \$13,358.75. On or about January 20, 2003, ComEd terminated Goose Island's electrical service for non-payment of bills. On or about January 24, 2003, Goose Island paid ComEd the amount of the "transfer debit" as well as associated fees and late charges.

On August 14, 2003, Goose Island filed its complaint against ComEd arguing that the "transfer debit" was unlawful and alleging claims for breach of contract, negligence, fraud, unjust enrichment and tortious interference with Goose Island's business. On August 29, 2003, ComEd filed its motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619 (West 2004). After a full briefing, on December 12, 2003, the trial court dismissed the complaint with prejudice.

This appeal followed.

On appeal, Goose Island contends that the trial court erred in dismissing its complaint for lack of jurisdiction. Goose Island argues in the alternative that its claims are valid at common law and that the Illinois Commerce Commission does not have exclusive jurisdiction over its claim.

The parties agree that our review of decisions of law is *de novo*. Stein v. Rio Parismina Lodge, 296 Ill. App. 3d 520, 523, 695 N.E.2d 518, 521 (1998); E.A. Cox Co. v. Road Savers International Corp., 271 Ill. App. 3d 144, 148, 648 N.E.2d 271, 275 (1995); see also Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill. App. 3d 810, 812, 695 N.E.2d 1339, 1340 (1998) (applying *de novo* standard to dismissal for lack of jurisdiction due to ICC preemption). On

review, this court considers only well-pleaded facts contained within the complaint. Ziemba v. Mierzwa, 142 Ill. 2d 42, 47, 566 N.E.2d 1365, 1366 (1991).

ComEd notes that Goose Island asserts facts within its brief on appeal that are not pled in its complaint, *i.e.*, that the "transfer debit" was "15 times its average monthly bill," and that the transfer debit was "placed on the bill without any explanation." In accordance with the above legal proposition, we do not consider facts *de hors* the record on appeal.

Initially, Goose Island contends that the circuit court has jurisdiction over this matter because the nature of its complaint is for damages associated with an unlawful utilities charge. Goose Island admits that the Act provides that complaints concerning excessive or unjust rates and charges as well as the reparations sought for these charges fall under the jurisdiction of the ICC. 220 ILCS 5/9-252 (West 2004). However, Goose Island argues that: "the Commission's jurisdiction is non-exclusive" and that section 5-201 of the Act (220 ILCS 5/5-201 (West 2004)), allows consumers to "bring damage suits against utilities in court, even when their claims involve violations of the Act." Wernikoff v. RCN Telecom Services of Illinois, Inc., 341 Ill. App. 3d 89, 94, 791 N.E.2d 1195, 1200 (2003).

Goose Island argues that a "transfer debit" charge does not fall within the broad definition of a "rate" or "charge" and that the ICC cannot provide relief for its claims as stated in its complaint because its claim is for "damages resulting from breach of contract or tortious conduct." Sutherland v. Illinois Bell, 254 Ill. App. 3d 983, 991, 627 N.E.2d 145, 152 (1993). In Sutherland, this court held that the plaintiff's action against a utility for unordered, inadequate and ambiguously billed telephone service was properly within the jurisdiction of the circuit court as the claims involved damages and relief for breach of contract. Sutherland, 254 Ill. App. 3d at 994. Goose Island also relies on Consumers Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill. App. 3d 959, 431

N.E.2d 1047 (1981), and Gowdey v. Commonwealth Edison Co., 37 Ill App. 3d 140, 148, 345 N.E.2d 785 (1976). In those cases this court found respectively that the circuit court could entertain both claims for negligent misrepresentation and negligent performance of the phone company and for inadequate rate disclosures by the electric company.

ComEd responds that Goose Island's claim is, in fact, regulated by the ICC. Under the Act, the ICC has established procedures governing eligibility for service, payment practices and service discontinuation. See generally, 83 Admin. Code §280.20. The ICC has exclusive jurisdiction over disputes alleging incorrect utility charges and improper service termination. See, e.g., Terminal Railroad Ass'n v. Public Utilities Commission, 304 Ill. 312, 317, 136 N.E.797, 800 (1922); Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill. App. 3d 810, 813, 695 N.E.2d 1339, 1340-41 (1998).

The Act defines "rate" to include "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility* * * ." 220 ILCS 5/2-116 (West 2004). ComEd explains that a "transfer debit" is a "rate" or "charge" that falls under the category of "other compensation" pursuant to ICC regulations.¹ 83 Ill. Admin. Code §280.50. This regulation permits ComEd to transfer a customer's unpaid balances to a bill for the same class of service. To protect utility customers, the ICC requires ComEd to provide booklets describing utility charges and bars a utility from discontinuing service while a customer is disputing a bill. 83 Ill. Admin Code §280.160©). ComEd points out that Goose Island acknowledged in its complaint that it was subject to a "transfer

¹ComEd admits that section 280.50 of the Code uses the term "transfer" in defining arrangements for payment of unpaid balances for the same "class of service." For example, ComEd is authorized to *transfer* a bill to a user for the same class of service (*i.e.*, non-residential), and for the same form of service (*i.e.* electricity). ComEd confirms that the word "debit" is not part of the definition of the process allowed for by the Code.

debit" charge, and was apprised of the transfer process. ComEd argues that it acted with full authority under the ICC regulations when it terminated service at Slick's Lounge. 80 Ill. Admin Code §280.130(a)(1)(b).

ComEd distinguishes the cases cited by Goose Island as inapposite. In Consumers Guild, the plaintiff sought damages for being misled by the telephone company into using the "wrong type of service," and this court found that the utility failed to inform the plaintiff of an available service that could have dramatically reduced telephone costs. Consumers Guild, 103 Ill. App. 3d at 964-65. Similarly, in Gowdey and Sutherland, the plaintiffs asserted that they were charged for a service that the utility had not clarified as optional. Gowdey, 37 Ill. App. 3d at 149; Sutherland, 254 Ill. App. 3d at 988.

Here, Goose Island has made no allegations that it was misled into using electrical service it did not need or request but, rather, asserts that the "transfer debit" mysteriously appeared on its bill as if by an occult hand. Although the record on appeal is silent as to the exact source of the charge, as noted above, Goose Island admits that it is contractually subject to charges that are transferred from one of its accounts to another account. We further note that during the oral argument of this matter, Goose Island disclosed that concurrent with this appeal, it is proceeding with a parallel claim that is pending before the ICC involving the same parties and subject matter as in the present case.

We find that Goose Island's complaint contemplates a dispute over utility rates. Thus, the matter is properly before the ICC and subject to its administrative regulations. As such, the trial court properly dismissed the complaint for lack of jurisdiction. We therefore affirm the judgment of the trial court.

Affirmed.

CAMPBELL, P.J., with O'BRIEN and NEVILLE, JJ., concurring.